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EU criminal law and fundamental rights

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PART II

THE HUMAN RIGHTS DIMENSION OF EU CRIMINAL LAW

5. EU criminal law and fundamental rights

*Paul De Hert**

1. INTRODUCTION

European Union criminal law has been described as a contentious policy area since its commencement.¹ Even today, after Lisbon, it remains a complex area within the context of competence and decision-making procedures. Smith argues that ‘it may be more useful to consider Justice and Home Affairs (JHA) to be a “policy universe” – comprising issues that are dealt with at the EU level under a variety of different institutional set-ups ... and across all of them’.² Eckes speaks about ‘an extensive and complex legal and institutional architecture for the area’.³

The EU approach to criminal law revolves around various axes, in particular the harmonization of substantive and procedural criminal law, and the mutual recognition of judicial decisions in criminal matters.⁴ A longstanding debate in EU criminal law scholarship is the relation between mutual recognition and the consequent need for the respect of fundamental rights by each Member State entering the judicial cooperation game. Criminal law and fundamental rights are indeed inherently linked, given that the penal instrument has both the power to protect and to compress fundamental rights. As such, it follows that in dealing with matters of criminal law, the EU must also take fundamental rights into account. The chapter first offers a background analysis to EU fundamental rights law, recalling the historical affirmation of the protection of fundamental rights as a EU concern, and the important innovation brought about by the Lisbon Treaty (section 2) and the multiplicity of actors involved in the system of fundamental rights protection in the EU (section 3). The aim is to demonstrate that the EU indeed has an important tradition and a great number of actors involved in the field. Subsequently the chapter turns to the main instrument of protection of fundamental

* The author wishes to thank Fisnik Korenica, Auke Willems and Irene Wieczorek for their help and assistance.

¹ Steve Peers, ‘Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon’ (2011) 48 *CMLR* 661. See Ilias Anagnostopoulos, ‘Criminal Justice Cooperation in the European Union after the First Few “Steps”: a Defence View’ (2014) 15 *ERA Forum* 9, at 10, who notes that the freedom, security and justice policy area was first introduced in the Amsterdam Treaty.

² Karen Smith, ‘The Justice and Home Affairs Policy Universe: Some Directions for Further Research’ (2009) 31(1) *Journal of European Integration* 1, at 3.

³ Christina Eckes, *A European Area of Freedom, Security and Justice: A Long Way Ahead?*, Working Paper 6a, (2011), p. 4.

⁴ Anagnostopoulos, ‘Criminal Justice Cooperation in the European Union’, above n. 1, t 10.

rights, namely the Charter of Fundamental Rights of the European Union ('the Charter'). First, it explains its scope of application, and its interaction with other sources of fundamental rights protection, and it shows that the system is potentially very protective (section 4). Moving on, the chapter examines the practical application of the Charter, and its interaction with EU criminal law norms, demonstrating that in fact the Court of Justice of the European Union (CJEU) tends to give precedence to the effectiveness of EU criminal law over fundamental rights (section 5). Furthermore, the chapter addresses the content of the Charter (section 6) and then goes deeper into the criminal law related provision in the Charter, in particular the presumption of innocence (section 7), the right to a fair trial (section 8), privacy and data protection (section 10), and proportionality and legality (section 10). The last section (section 11) provides some conclusive remarks, evaluating the interaction between fundamental rights and EU criminal law, and calling for a further refinement of this interaction.

2. BUILDING OF LUXEMBURG'S FUNDAMENTAL RIGHTS SYSTEM

The initial Treaty construction of the former European Community (the EEC Treaty) had neither proclaimed nor enshrined any specific fundamental rights law obligation for the Union. Under specific historical conditions, the aim of the Community was to carry out economic integration rather than to embark on political domains of integration of concern for fundamental rights law.⁵ Nevertheless, this did not stop claimants from submitting fundamental rights cases to the former European Court of Justice (ECJ). Two fundamental rights cases (among the most persistent) were *Stork*⁶ and *Geitling*,⁷ both dismissed as inadmissible by the Court, the latter clearly showing that it did not wish to partake in fundamental rights jurisdiction.⁸ This situation started to change gradually, partially from the pressure of national courts⁹ and partially under the stress of the EU's own credibility claims. *Van Gend en Loos* represented a huge step forward for the Court, concurrently trying to root Community law in an independent basis from that of its Member States. In this case, the Court ruled that 'Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.¹⁰ Subsequent case

⁵ See e.g. generally, Frank Schimmelfennig, 'Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalization of Human Rights in the European Union' (2006) 13(8) *Journal of European Public Policy* 1247.

⁶ 1/58 *Friedrich Stork & Co., Kohlen- und Stahlhandel v. High Authority of the European Coal and Steel Community*, ECJ, Judgment of 4 February 1959.

⁷ 16/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft MbH v. High Authority of the European Coal and Steel Community*, ECJ, Judgment of 12 February 1960.

⁸ On the rationale for the development of fundamental rights law at that early stage, see generally Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *CMLR* 669.

⁹ Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaption' (2013) 76 *Modern Law Review* 254, at 257.

¹⁰ 26/62 *Van Gend en Loos v. The Netherlands*, ECJ, Judgment of 5 February 1963, at 2.

law, such as *Stauder*,¹¹ *Internationale Handelgesellschaft*,¹² *Nold KG*¹³ and finally *Hauer*¹⁴ progressively elevated fundamental rights to the rank of General Principles of EU law. The substance of these principles should have been drawn from the international agreements binding on Member States, among which especially the European Convention on Human Rights and Fundamental Freedoms (ECHR), and from the national constitutional traditions of Member States. With respect to this period of jurisprudential affirmation of fundamental rights as EU primary law, one author interestingly spoke of a *gouvernement des juges* prerogative.¹⁵ After these case law developments, finally, with Maastricht the obligation of the Union to respect fundamental rights was formalized in a Treaty. The Treaty on the European Union (TEU) states that the 'Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.¹⁶

In 2000, a further step in the building of the Luxembourg fundamental rights system was taken: the Charter of Fundamental Rights of the European Union, an EU document which reproduced to a great extent the content of the ECHR, was solemnly proclaimed. The Charter was first proclaimed in a Convention,¹⁷ which represented the multifaceted nature of EU institutions. The Charter was then more officially adopted in the Biarritz European Council, where the importance of the respect of fundamental rights for the legitimacy of the EU was underlined.¹⁸ Despite the Charter's lack of legal force, the Charter was openly referred to by the CJEU in its case law, for example in *Unibet*.¹⁹ The judges nonetheless underlined that the Charter does nothing more than confirm the rights 'recognised in the Union and makes those rights more visible, but does not create new rights or principles'.²⁰ However, the remarkable deference shown to the Charter

¹¹ 29/69 *Stauder v. City of Ulm* [1969] ECR 419, ECJ, request a preliminary ruling (422). See Schimmelfennig, 'Competition and Community', above n. 5, at 1248.

¹² 11/70 *Internationale Handelgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, 1134, ECJ. See also Rick Lawson, 'Human Rights: the Best is Yet to Come' (2005) 1(1) *European Constitutional Law Review* 27, at 28.

¹³ C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission*, ECJ, Judgment of 4 May 1974, at 507 [para. 13].

¹⁴ 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, ECJ, Judgment of 13 December 1979.

¹⁵ On this idea and concept, see J. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities' (1986) 61 *Washington Law Review* 1103, at 1115.

¹⁶ Maastricht Treaty, Title I, Art. F(2) [1992] OJ C191, 29 July 1992.

¹⁷ Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe, 2014), p. 34.

¹⁸ European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, Annex II, para. 1.

¹⁹ C-432/05 *Unibet v. Justitiekanslern* [2007] ECR I-2271, CJEU. See Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 *CMLR* 1565, at 1569 *et seq.*

²⁰ C-411/10 and C-493/10 *NS and others*, CJEU, Judgment of 21 December 2011, para. 119.

can be seen in the example of the Austrian Constitutional Court, which noted that the Charter ‘may also be invoked as constitutionally guaranteed rights’ in proceedings before it.²¹

The Lisbon Treaty represented a turning point in the construction of the EU system of protection of fundamental rights. With Article 6(1) TEU, the Charter became included within EU primary law (it has the ‘same legal value as the Treaties’).²² Subsequently, all EU legislation and international agreements wherein the EU is a party were required to comply with the Charter. Article 6(2) TEU also obliges the Union to accede to the ECHR. Finally, Article 6(3) recalls that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, will constitute general principles of the Union’s law. With the Charter as part of primary law and the accession process legally compulsory under the Treaties, the Lisbon Treaty marks the most lively fundamental rights experience of the Union,²³ leaving no doubt about the centrality of fundamental rights law in the Union.²⁴

3. COMPLEXITY OF SOURCES AND OF ACTORS WITHIN LUXEMBURG’S FUNDAMENTAL RIGHTS SYSTEM

Article 6 TEU illustrates the complex articulation of the Luxembourg system for the protection of fundamental rights. There are three sources of fundamental rights law in the EU: the EU Fundamental Rights Charter; secondly, the general principles of fundamental rights law recognized (some also innovated) by the CJEU with reference to the constitutional traditions of EU Member States and to fundamental rights international instruments, especially the ECHR; and, thirdly, the ECHR itself as an independent source, when the EU will accede to the Convention. The complexity of the EU fundamental rights system, which stems from this plurality of sources, is also enhanced by the multiplicity of actors who are involved. First, the CJEU is an important actor which is entrusted with interpreting and ruling on EU law, including the Charter. Moreover, the European Court of Human Rights (ECtHR) provides interpretation of Convention rights. The position of the Strasbourg Court matters for the purpose of interpreting fundamental rights as General Principles of EU law, whose sources are, as stated, the constitutional traditions of Member States as well as the European Convention. Moreover, the position of the ECtHR is also important for the interpretation of the EU Charter itself, as in principle EU Charter-based rights cannot be given a more restrictive interpretation than the equivalent Convention rights. Finally,

²¹ Maartje de Visser, ‘National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape’ (2014) 15 *Human Rights Review* 39, at 43.

²² Wolfgang Weiß, ‘Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon’ (2011) 7 *European Constitutional Law Review* 64.

²³ See e.g., Gráinne de Búrca, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’ (2011) 105(4) *American Journal of International Law* 649.

²⁴ A. Von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) 37 *CMLR* 1307, at 1338.

when the EU will accede to the ECHR, the ECtHR will be able to exert influence on the EU interpretation and implementation of Convention rights.

In addition, national courts also play a role. Not only do they have to implement EU fundamental rights law,²⁵ but they can also refer preliminary rulings to the CJEU, thus fostering discussion, and possibly the expansion, of EU fundamental rights law.²⁶ Finally, one should also take into account the role of the Fundamental Rights Agency, which ‘has no legislative or regulatory powers, no quasi-judicial competence and no authority to adopt legally binding decisions with effect upon third parties’,²⁷ but whose reports on Member States’ implementations of fundamental rights and EU policy shaping can be very influential. The Agency has delivered important outputs that are relevant for both Member States and the EU criminal policies.²⁸

4. SCOPE OF APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS: ARTICLES 51–53

Article 51 of the Charter prescribes that the fundamental rights enshrined within it apply only to persons affected by a measure of an EU institution or Member States’ action or omission deriving from an obligation under EU law.²⁹ As to the technical operation of Article 51 Charter, the CJEU has ruled in *Åkerberg Fransson*³⁰ that this

²⁵ C-5/88 *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, ECJ, Judgment of 13 July 1989, para. 19. See also C-2/92 *Bostock* [1994] ECR I-955, para. 16, ECJ.

²⁶ See the famous case on the extensive application of the victims rights Framework Decision, C-105-03 *Criminal Proceedings against M. Pupino*, CJEU, Judgment of 16 June 2005.

²⁷ Jacqueline Dutheil de la Rochère, ‘Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty’ (2010) 33 *Fordham International Law Journal* 1776.

²⁸ Among these we can mention the *Handbook on European Law* relating to asylum, borders and immigration, which demonstrates a thorough framework to guide authorities in respecting fundamental rights of migrants, asylum seekers and those subject to border criminal procedures; the report on *Criminalization of Migrants in an Irregular Situation and of Persons Engaging with Them* (Brussels, European Union Agency for Fundamental Rights, 2014); Opinion of the European Union Agency for Fundamental Rights on a Proposal to Establish a European Public Prosecutor’s Office, FRA Opinion – 1/2014 [EPPO] Vienna, 4 February 2014; the report on *Fundamental Rights in the Future of the European Union’s Justice and Home Affairs* (Vienna, European Union Agency for Fundamental Rights, 31 December 2013); and finally *Fundamental Rights-based Police Training: a Manual for Police Trainers* (Brussels, European Union Agency for Fundamental Rights, 2013). These are all available at <http://fra.europa.eu/en/publications-and-resources>.

²⁹ Cf. S. Douglas-Scott, ‘The EU Charter of Fundamental Rights as a Constitutional Document’ (2004) 37 *European Human Rights Law Review* 7, available at SSRN: <http://ssrn.com/abstract=2458672>, who argues that this clause seems to say that the Charter is primarily addressed to the EU and not to its Member States.

³⁰ C-617/10 *Åkerberg Fransson*, CJEU, Judgment of 26 February 2013, para. 19 *et seq.* One more issue that needs to be mentioned is the scope of fundamental rights limitations from the perspective of EU competences. The CJEU has ruled in *Lisa Jacqueline Grant* that, ‘[a]lthough respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the

110 *Research handbook on EU criminal law*

test is performed with the indicator of whether there is an organic relationship between an act or omission and the business of the EU. Ritleng rightly notes that both in *Fransson* and in a later case, *Melloni*, the Court did not apply the usual diplomatic language that would essentially not have contributed to the resolution of the problem, but gave in its ruling a substantive formulation that resolved the dilemmas on the horizontal interaction of the Charter with other fundamental rights instruments in Europe.³¹ Interestingly, in the *Fransson* case, the Court ruled that even criminal sanctions fall within the scope of Member States' duty under EU fundamental rights law when they implement EU law.³² This seems a large step forward in constitutionalizing Member States' obligations under the growing interaction between EU criminal law and fundamental rights.

However, the Court does not always seem consistent on the application of the *Fransson* formula. In *Siragusa* (which falls into line with the decisions of *Iida*³³ *Annibaldi*³⁴), the CJEU deferred to a far more restrictive and specific-criteria oriented approach. A general aim of this new set of criteria is to 'consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States'.³⁵ As opposed to the very flexible approach in *Fransson*, which allowed for a great number of national measures to fall within the scope of the Charter, in *Siragusa* the Court seemed to follow a line of reasoning that basically implemented the idea of guaranteeing that the uncertainty with regard to the scope of obligations under Article 51 Charter may not be interpreted by national courts to the detriment of competences that remain with Member States (something that gives greater efficacy to Article 51(2) Charter as well). Finally, one should note that Article 51 Charter also determines that the Charter may not confer new competences on the EU, over and above existing competences, in order to ensure that fundamental rights law does not become a basis for increasing the competences of the EU to the detriment of Member States.³⁶

effect of extending the scope of the Treaty provisions beyond the competences of the Community'. C-249/96 *Lisa Jacqueline Grant*, CJEU, Judgment of 17 February 1998, para. 45. See also in this regard Opinion 2/94 [1996] ECR I-1759, paras 34, 35, CJEU). This case made it clear that fundamental rights development in the EU may not serve as a basis to extend the competences conferred on the EU.

³¹ Dominique Ritleng, 'The Contribution of the Court of Justice to the Structuring of the European Space of Fundamental Rights' (2014) 5(4) *New Journal of European Criminal Law* 507, at 509. Cf. Erich Vranes, 'The Final Clauses of the Charter of Fundamental Rights: Stumbling Blocks for the First and Second Convention' (2003) 7(7) *European Integration online Papers (EIoP)* 6, who notes that some scholars have even required the entire deletion of the horizontal clauses from the Treaties. The counter-argument to this is that such deletion would seriously endanger the *acquis*.

³² Ritleng, 'The Contribution of the Court of Justice', above n. 31, at 509.

³³ C-40/11 *Iida* [2012] ECLI:EU:C:2012:691, para. 79.

³⁴ C-309/96 *Annibaldi* [1997] ECR I-7493, paras 21–3.

³⁵ C-206/13 *Cruciano Siragusa v. Regione*, ECJ, Judgment of 6 March 2014, para. 31.

³⁶ See also de Visser, 'National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights', above n. 21, at 44.

Article 52 Charter concerns itself with the possible limitations to the rights enshrined in the Convention. These are admitted if contained in EU secondary law, while respecting the ‘essence of the right’, as well as the principle of proportionality. However, if a certain Charter limitation may infringe an ECHR-based right, due to its more restrictive approach, then one may defer to Article 52(3) Charter which provides that if the Charter contains rights that have an equivalent in the ECHR, the meaning and scope of those rights will be the same as those laid down by that Convention.³⁷

Finally, Article 53 Charter imposes a ‘maximum standard clause’,³⁸ stating that the application of the Charter cannot restrict or limit higher fundamental rights standards as contained in Union or international law, international agreements to which Member States are a party, and Member States’ constitutions.

The articulation of these three provisions that take into account all possible standards of protection for fundamental rights seem to provide a tentative answer to scholars’ longstanding concern regarding the ‘under-inclusive range of fundamental rights entitled to protection by the European judiciary’.³⁹ Nonetheless, as the next paragraph will show, the CJEU has provided a very restrictive interpretation of the range of fundamental rights, when that would clash with the effective implementation of EU law, more specifically with EU criminal law.

5. CJEU’S CASE LAW ON SCOPE OF APPLICATION OF CHARTER: INTERACTION BETWEEN FUNDAMENTAL RIGHTS AND EU CRIMINAL LAW

In a first case, *Da Silva*, the CJEU was confronted with a question concerning a potential clash between EU and national criminal law, namely, the European Arrest Warrant (EAW) Decision and the relevant implementing legislation, and a Treaty-based fundamental right (namely, the right to not be discriminated against on the ground of nationality). The Court gave precedence to the Treaty-based right, while nonetheless stressing the importance of the concept of the effectiveness of the EAW. In particular,

³⁷ As to the nature of limitations on privacy rights, see A. Galetta and P. De Hert, ‘Complementing the Surveillance Law Principles of the ECtHR with its Environmental Law Principles: An Integrated Technology Approach to a Human Rights Framework for Surveillance’ (2014) 10(1) *Utrecht Law Review* 55.

³⁸ Cf. Alison Young, ‘The Charter, Constitution and Human Rights: Is This the Beginning or the End for Human Rights Protections by Community Law?’ (2005) 11(2) *European Public Law* 226 (‘The second main criticism of the legal protection of rights within the European Union is that it represents a “race to the bottom”, meaning that there is only a bare minimum of rights protected by Community law’).

³⁹ de Visser, ‘National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights’, above n. 21, at 41.

112 *Research handbook on EU criminal law*

the decision in *Da Silva* was argued to have ‘stretched the reach of the classic effectiveness test’ as regards the European Arrest Warrant.⁴⁰

The importance of the effectiveness of EU criminal law is even more enhanced in two paradigmatic cases, *Melloni*⁴¹ *Radu*.⁴² In *Melloni*, the CJEU was asked if national constitutional standards on the right to defence could take precedence over the interpretation of an act of EU secondary law, namely, the EAW, and thus bar its application. We have seen that Article 53 Charter states that nothing in the Charter – not even limitations imposed by EU secondary law, as is the case with the EAW – should lead to a restrictive interpretation of fundamental rights, as enshrined in, among other things, national constitutional traditions. In the case at hand, the Court gave a very restrictive interpretation of the Article, stating that it could be relied upon only if ‘the primacy, unity and effectiveness of EU law are not thereby compromised’.⁴³ This reading of Article 53 Charter is not uncontroversial.⁴⁴ Sanchez rightly notes that a teleological interpretation of Article 53 would not allow a restrictive approach to its scope.⁴⁵ The limitation pronounced by the Court in *Melloni*, therefore, may seriously undermine national constitutional fundamental rights if they are more extensive than EU Charter rights.

In *Radu*, the national court asked whether it could refuse to execute an EAW if such execution was in breach of the right to liberty and security and to the presumption of innocence and right to defence, as the person sought to be surrendered on the basis of an EAW was being deprived of liberty without the requesting Member State first hearing his/her case. The CJEU argued that ‘the European legislature has ensured that the right to be heard will be observed in the executing Member State in such as way as not to compromise the effectiveness of the European arrest warrant system’.⁴⁶ Therefore, the Court refused to regard as a ground for non-execution the fact that the warranted person had not been heard in the requesting Member State.⁴⁷ The approach in *Radu* has been argued to be ‘too narrow’,⁴⁸ with Advocate General Sharpston promoting the view that national courts should have space to consider fundamental rights if such EAW decisions are alleged to have seriously violated a person’s rights. Any such limitation, according to her, would amount to no more than a well-dressed

⁴⁰ E. Herlin-Karnell, ‘Constitutional Principles in the Area of Freedom, Security and Justice’ in D. Acosta and C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Oxford, Hart Publishing, forthcoming), p. 7, available at <http://ssrn.com/abstract=2263990>.

⁴¹ C-399/11 *Stefano Melloni*, CJEU, Judgment of 26 February 2013.

⁴² C-396/11 *Ciprian Vasile Radu*, CJEU, Judgment of 29 January 2013.

⁴³ *Melloni*, above n. 41, para. 60.

⁴⁴ de Visser, ‘National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights’, above n. 21, at 46.

⁴⁵ Sánchez, ‘The Court and the Charter’, above n. 19, at 1584.

⁴⁶ *Radu*, above n. 42, para. 41.

⁴⁷ *Ibid.* para. 43.

⁴⁸ Anagnostopoulos, ‘Criminal Justice Cooperation in the European Union’, above n. 1, at 17.

banality.⁴⁹ Briefly, *Radu*, confirms the CJEU's insistence on keeping the European Arrest Warrant sufficiently effective, therefore giving precedence to the latter rather than to a deeper fundamental rights reflection.

In providing brief concluding remarks, the German national court provided a concise statement on the matter. Referring to *Melloni* and *Radu*, the German national court (with an interesting and critical approach) ruled that the CJEU was requesting national courts to implement an EAW decision even when such a decision 'evidently violates fundamental rights'. 'Indeed states must not lend a willing hand to evident human rights violations by other states ... and certainly mutual recognition must not be a cloak to mutually recognize human rights violations'.⁵⁰ Drawing on this background and criticism, Anagnostopoulos demands 'the insertion of clear fundamental rights and proportionality clauses into the EAW Framework Decision' to enable the EU criminal law system to better protect the rights of those subject to it.⁵¹

6. CONTENT OF THE CHARTER AND ITS RELEVANCE FOR EU CRIMINAL LAW

Having debated the reach of the Charter, both in theory and in its practical interpretation, this and the following paragraphs will look more closely at the content of the Charter.

The structure of this fundamental document is rather simple. It is divided into six fundamental rights categories and one category on general provisions concerning the nature and legal mode of its application (the latter being the last chapter of the Charter). The six categories of the Charter reflect six groups of fundamental rights, as follows: dignity, freedoms, equality, solidarity, citizens' rights and justice.⁵² Some argue that the substance of the Charter rights (meaning the civil and political rights) have been drafted in the light of the ECHR, and that they simply imitate the latter while trying to maintain a more contemporary terminology on some modern issues (e.g., the term 'communications' in the Charter echoes the term 'correspondence' in the ECHR).⁵³ In addition, it is argued that the Charter's provisions seem to offer broader protection than the text of the ECHR in some specific instances⁵⁴ – although in many respects the Charter's political and civil rights are almost a exact copy of the ECHR.

One general observation on the content of the Charter is that it lacks a *sui generis* reflection about what rights are needed in a Union with divided competences that is supposed to concentrate first and foremost on the transnational aspects. One rare

⁴⁹ *Radu*, above n. 42, Opinion of AG Sharpston of 18 October 2012, para. 36 *et seq.* See also Anagnostopoulos, 'Criminal Justice Cooperation in the European Union', above n. 1, at 17.

⁵⁰ Cited in Anagnostopoulos, 'Criminal Justice Cooperation in the European Union', above n. 1, at 18.

⁵¹ *Ibid.* 19.

⁵² For commentary see S. Peers, T. Harvey, J. Kenner and A. Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014).

⁵³ Callewaert, *The Accession of the European Union*, above n. 17, at 36.

⁵⁴ *Ibid.* 36.

114 *Research handbook on EU criminal law*

exception to that is Article 50 Charter on the right not to be tried or punished twice in criminal proceedings for the same criminal offence:

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.⁵⁵

One can regret not seeing more of these provisions focusing on the fundamental rights aspects of transnational criminal law. Some fundamental rights guidance with regard to jurisdiction, or defence rights during surrender procedures, could have had an added value, that the Charter-fathers have not considered providing.⁵⁶ As set out in the paragraphs that follow, the focus is on fundamental rights provisions in the Charter with relevance to EU criminal law.

7. EU CRIMINAL LAW AND THE PRESUMPTION OF INNOCENCE (ARTICLE 48 CHARTER)

On the right on presumption of innocence, the Charter echoes the ECHR (Article 6(2)) by establishing that (Article 48 Charter):

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 48 Charter makes it evident that the concept of presumption of innocence is provided in a relatively broad scope, and does not only apply to criminal proceedings. This appears broader than Article 6(2) ECHR which guarantees the presumption of innocence merely in criminal offence proceedings. The *Explanations to the Charter* note that, in light of Article 52(3) Charter, discussed above, Article 48 Charter has the same meaning and scope as its ECHR counterpart.⁵⁷

Article 6 ECHR allows no exceptions to the presumption of innocence, something that, on basis of the *Explanations*, should be extended to the meaning of Article 48 Charter as well (in view of the obligation under Article 52(3) Charter to apply the same scope to Charter and Convention rights). The practice, nonetheless, is rather different

⁵⁵ There is a wealth of case law and literature on this *ne bis in idem* right that can easily be searched via the Internet (which is why I have not included it in this chapter). A good starting point for research is A.-J. Kargopoulos, 'Ne bis in idem in Criminal Proceedings' in Maria Bergström and Anna Jonsson Cornell (eds), *European Police and Criminal Law Co-operation* (Oxford, Hart Publishing, 2014), pp. 85–126.

⁵⁶ Cf. A. Ward, 'Damages under the EU Charter of Fundamental Rights' (2012) 12 *ERA Forum* 589 ('There is nothing innovative in the EU Charter of Fundamental Rights from the perspective of damages').

⁵⁷ EU Council, *Charter of Fundamental Rights of the European Union, Explanations relating to the Complete Text of the Charter* (December 2000), p. 67.

and both courts' case law demonstrates that the presumption of innocence may at times be weakened.

There is a nexus between the presumption of innocence and the right to defence – something that builds upon the right to fair trial as well, prescribed in Article 47 Charter. The right to fair trial is tied to the use of the right to defence in the context of all types of proceedings involving punishment. The CJEU has ruled in several cases on the presumption of innocence, but has not, until now, gone so far as to discuss also the right to defence. In *Hüls*, the claimant complained that the court of first instance 'was in breach of the principle that the benefit of the doubt must be given or the presumption of innocence'.⁵⁸ The claimant held that a breach of this presumption also occurred when it was evident that the court had not justified the conclusions to which it arrived in its judgment on the basis of facts presented during the proceedings.⁵⁹ The claimant also requested that the presumption of innocence be recognized (on basis of the ECHR) in other administrative areas involving fines, such as competition law in the Union.⁶⁰ In response, the CJEU noted, first, that the presumption of innocence, as also deriving from Article 6(2) ECHR, forms a fundamental right protected in the Union legal order.⁶¹ In devising the test on the scope of the presumption of innocence, referring to the ECtHR cases of *Öztürk*⁶² and *Lutz*,⁶³ the Court ruled that 'given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties', the presumption of innocence applied in this procedure as well.⁶⁴ *Hüls* seems to establish two criteria that need be tested, against which the scope of the principle on the presumption of innocence is set. The two criteria seem to be cumulative in nature.

The first criterion tackles the nature of the infringement. The law must recognize a certain level of importance of the infringement at stake due to its significant interference with the public interest. The second criterion tackles the nature and degree of rigorousness of the resulting penalties that the law foresees for the infringement concerned (resulting from the first criterion). This said, the test in *Hüls* seems to be of a substantive nature when it comes to defining the scope of the principle of presumption of innocence, meaning that it does not define the presumption on the basis of the field of law, but rather on the basis of the individual situation of the defendant to which any type of law applies which fulfils the two criteria. Such a substantive test, as opposed to a formal test based on the field of law, seems more effective to ensure the legal certainty of the procedure wherein claimants may rely on the presumption concerned.

⁵⁸ C-199/92P *Hüls AG v. Commission*, ECJ, Judgment of 8 July 1999, para. 59.

⁵⁹ *Ibid.* paras 139, 140.

⁶⁰ *Ibid.* para. 62.

⁶¹ *Ibid.* para. 149.

⁶² *Öztürk*, Series A No. 73, ECtHR, Judgment of 21 February 1984.

⁶³ *Lutz*, Series A No. 123-A, ECtHR, Judgment of 25 August 1987.

⁶⁴ *Hüls*, above n. 58, para. 150.

116 *Research handbook on EU criminal law*

Another interesting case reflecting the presumption of innocence is *Solvay*.⁶⁵ The case concerned the presumption of evidence, rather than the proof of it, and as a result whether the claimant had violated the law for a certain period of time. The CJEU ruled that:

[i]n the absence of other evidence, the Commission's contention [regarding the claimant's infringement] amounts to presuming that from a date fixed by the Commission the applicant and ICI began to infringe the provisions of the Treaty by implementing a concerted practice.⁶⁶

Such presumption of evidence accepted by the Commission, the Court said, contravened the principle of presumption of innocence.⁶⁷ *Solvay* clearly exhibits the intention of the CJEU to ensure that evidence must be processed on the basis of a standard requiring proof rather than presumption, otherwise any contention will fail to meet the required standard.

From the perspective of the EU's positive obligations, there is also currently a legislative initiative on the draft Directive to Strengthen the Presumption of Innocence. It covers issues relating to the right to refuse to be 'presented as guilty' before any authority, ensuring that the 'burden of proof' is on the prosecution while the suspect or accused is guaranteed the principle of *in dubio pro reo*, 'the right not to incriminate oneself, the right not to cooperate and the right to remain silent', and 'the right to be present at one's trial'.⁶⁸ This will also show far better compliance with the ECHR standard on the presumption of innocence.⁶⁹ The proposed Directive would mark a huge step forward in setting clearer standards on this principle from the perspective of criminal law.

All told, there is a relatively well-regarded case law relating to the presumption of innocence, where the CJEU has used a moderately extensive scale of substantive criteria to make its application relevant and necessary whenever claimants are involved in proceedings in any field of law. The draft Directive on this issue would also seem to be a good opportunity to further strengthen the fundamental rights of those suspected or accused.

8. EU CRIMINAL LAW AND THE RIGHT TO A FAIR TRIAL (ARTICLE 47 CHARTER)

The right to effective legal remedy and a fair trial is guaranteed by Article 47 Charter:

⁶⁵ T-30/91 *Solvay v. Commission*, ECJ, Judgment of 29 June 1995.

⁶⁶ *Ibid.* para. 73.

⁶⁷ *Ibid.* 73.

⁶⁸ Claire Perinaud, *Towards a European Union Legislation on Presumption of Innocence in Criminal Law*, (2014), p. 3, available at <http://free-group.eu/2014/11/30/towards-and-european-union-legislation-on-presumption-of-innocence-in-criminal-law/#more-1660>.

⁶⁹ *Ibid.* 8.

EU criminal law and fundamental rights 117

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 47 Charter provides the right to an effective legal remedy to any defendant (EU citizens or not, conditional on their being subject to the jurisdiction of the EU) to access a court of law in the EU. In guaranteeing this right, Article 47 Charter offers a full scope to it, not merely within civil and criminal obligations.⁷⁰ As regards fair trial, Article 47 Charter echoes the ECHR guarantees for an independent and impartial tribunal, including the right to be defended and represented. Article 47 Charter also provides for the right to legal aid for those in certain difficult economic conditions in order to make their access to the CJEU efficient. These rights may, according to the EU Treaties, be given substance either by the right to a direct action (e.g., action for annulment for non-privileged applicants under Article 263(2) of the Treaty on the Functioning of the European Union (TFEU); action for failure to act under Article 265 TFEU; action for damage under Article 340 TFEU) or by the right to an indirect action, through a preliminary reference referred by a national court to the CJEU under Article 267 TFEU. Note, however, that many deem the scope of the preliminary reference procedure to be non-compliant with the right to access to court through an efficient legal remedy (as was argued by Advocate General Jacobs in the *UPA* case)⁷¹ as that procedure is not a right of the claimant in itself and not a guarantee that the very issue pending before the national court will be reviewed in substance by the CJEU.⁷²

Article 47 Charter has been further developed in EU secondary law based on the 2009 Roadmap on Procedural Rights (presented by the Swedish Presidency), which proposed a rich criminal-law legislative agenda for the Union in the context of fundamental rights development post-Lisbon changes. Such a Roadmap pragmatically builds upon the concept of positive obligations for the Union in light of Article 47 Charter. In the context of this Roadmap, there have been three legislative instruments introduced and adopted to date:⁷³ (a) Directive 2012/13/EU on the right to information

⁷⁰ Cf. ECtHR giving a narrower scope to Art. 6 ECHR compared to Art. 47 Charter. See *Massa v. Italy* (Appl. No. 14399/88), Ser. A, 265 B, ECtHR, Judgment of 24 August 1993. *Contra: Explanations to the Charter*, above n. 57, at 65, note that the right to an effective remedy is broader than in the Convention, by reference to 222/84 *Johnston* [1986] ECR 1651, ECJ, Judgment of 15 May 1986. It seems difficult, knowing the current system of legal remedies in the EU, to come to this conclusion from a practical point of view.

⁷¹ C-50/00 *P Unión de Pequeños Agricultores v. Council of the European Union*, AG Jacobs Opinion, 21 March 2002, para. 42 *et seq.*

⁷² Cf. Lawson, 'Human Rights', above n. 12, at 29, asking the question as to why the Charter may not fix this deficiency.

⁷³ Anagnostopoulos, 'Criminal Justice Cooperation in the European Union', above n. 1, at 12. See also Perinaud, *Towards a European Union Legislation*, above n. 68, at 2

118 *Research handbook on EU criminal law*

in criminal proceedings establishing rights to information of persons subject to the European Arrest Warrant (suspects or accused); (b) Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings⁷⁴ which has raised a number of concerns, especially from Member States, with regard to the timing and scope of the rights deriving from it, the possible derogations from them, the admissibility of evidence and the confidentiality of the lawyer-client relationship;⁷⁵ and (c) Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, which establishes the right to use of their native language for those in criminal proceedings under EU law.

A number of cases demonstrate what the CJEU has substantively established with regard to the right to be heard and fair trial. In *Johnston* and *UPA*, the CJEU recognized that the right under Article 47 Charter has the status of a General Principle of law in the EU, in the context of effective judicial protection.⁷⁶ In *Pertbroeck* and *Rewe*, the Court ruled that this right should be offered in an effective manner and that its utilization must not be rendered ‘virtually impossible or successively difficult’.⁷⁷ In defining the scope of this right, the CJEU has held in *Transocean* that ‘a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known’.⁷⁸ This seems to be a rather broad recognition of the right to access for claimants in any proceedings, including penalty procedures before the Commission. This seems to correspond to the ECHR standards.

In *A v. B and others*, the CJEU ruled that, as regards the right to defence under Article 47 Charter:

if a national court appoints ... a representative *in absentia* for a defendant upon whom the documents instituting proceedings have not been served because his place of domicile is not known, the appearance entered by that representative does not amount to an appearance being entered by that defendant.⁷⁹

This ruling marked significant progress towards protecting persons from the effect of judicial proceedings if they have not been personally part of the proceedings. On the other hand, in an equally interesting case, while ensuring the equality between EU

⁷⁴ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1–10 and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1–12.

⁷⁵ Anagnostopoulos, ‘Criminal Justice Cooperation in the European Union’, above n. 1, at 13.

⁷⁶ C-222/84 *Johnston* [1986] ECR 1651, ECJ, Judgment of 15 May 1986, para. 18. C-50/00P *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677, ECJ, Judgment of 25 July 2002, para. 39.

⁷⁷ C-312/93 *Pertbroeck v. Belgian State* [1995] ECR I-4599, ECJ, Judgment of 14 December 1995, para. 23. See also C-33/76 *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5.

⁷⁸ C-17/74 *Transocean* [1974] ECR 1063, ECJ, Judgment of 23 October 1974, para. 15.

⁷⁹ C 112/13 *A v. B and others*, CJEU, Judgment of 11 September 2014, para. 2.

citizens and non-citizens when it comes to the enjoyment of Article 47 Charter, in *Moussa Abdida*, the Court made a great effort to protect fundamental rights by ruling that:

procedures in Member States for returning illegally staying third-country nationals must be interpreted as precluding a national procedural rule which does not make available a remedy with automatic suspensive effect where an appeal is lodged against a return decision the enforcement of which may expose the person concerned to a risk of inhuman or degrading treatment.⁸⁰

In the case at hand, the Court clearly employed a rather generous degree of protection for the right to access to the court for a third country national who was being repatriated to his/her home country.

Another aspect, also defined by Article 47 Charter, was dealt with in *Kamino International Logistics BV*, where the CJEU accentuated a rather broad scope of the right to defence, establishing that:

[t]he principle of respect for the rights of the defence by the authorities and the resulting right of every person to be heard before the adoption of any decision liable adversely to affect his interests ... may be relied on directly by individuals before national courts.⁸¹

The Court also ensured that these rights are applied by national courts in line with the principle of effectiveness.⁸² Such an approach by the CJEU seems well-designed to ensure that every claimant will have the right to defence safeguarded before or during proceedings liable to produce a legal effect on his/her situation, with the claimant's defence counsel being given the chance to defend the claimant's position effectively before the adoption of the decision concerned.

In *Khaled Boudjlida*, the CJEU went even further, by establishing that:

[t]he right to be heard in all proceedings ... must be interpreted as extending to the right of an illegally staying third-country national to express, before the adoption of a return decision concerning him, his point of view on the legality of his stay, on the possible application of ... that directive and on the detailed arrangements for his return.⁸³

It also ruled that the right to be heard:

must be interpreted as meaning that an illegally staying third-country national may have recourse, prior to the adoption by the competent national authority of a return decision concerning him, to a legal adviser in order to have the benefit of the latter's assistance when he is heard by that authority.

⁸⁰ C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, CJEU, Judgment of 4 September 2014, para. 159(2).

⁸¹ Joined Cases C-129/13 and C-130/13 *Kamino International Logistics BV, Datema Hellmann Worldwide Logistics BV v. Staatssecretaris van Financiën*, Judgment of 3 July 2014, para. 1.

⁸² *Ibid.* para. 3.

⁸³ C-249/13 *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, Judgment of 11 December 2014.

120 *Research handbook on EU criminal law*

if that does not undermine the effectiveness of the legislation in that field.⁸⁴ This genuinely goes further in establishing a full-fledged space for the claimant to have recourse to effective court proceedings.

9. EU CRIMINAL LAW AND PRIVACY AND DATA PROTECTION (ARTICLES 7 AND 8 CHARTER)

The rights to privacy protection and data protection fall within the series of ‘new generation rights’, mainly imposed by the development of technology and its interaction with human behaviour. Article 7 Charter provides:

Everyone has the right to respect for his or her private and family life, home and communications.

With regard to private data protection, Article 8 Charter reads:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

Contrary to its ECHR counterpart (Article 8), Article 7 Charter on privacy, family life, home and communications seems to be more inclusive and broader. The term ‘communications’ as compared to ‘correspondence’ used in Article 8 ECHR, is a term that takes into account technological developments of today.⁸⁵ Article 7 Charter does not mention possible limitations. The *Explanations to the Charter* note that Article 7 Charter corresponds to the ECHR standards, adding that limitations on it may not be more restrictive than those allowed in the former.⁸⁶ Article 7 Charter will, as is the case with its counterpart Article 8 ECHR, play a key role in the future design of criminal sanctions (which need to respect these rights and thus cannot disproportionately limit them) and of criminal powers, such as search and seizure, interception of communications and surveillance. The protection of the home under this right has, for instance, been extended by the CJEU in such a way that business premises are also covered (*Roquette Frères SA*).⁸⁷

Article 8 Charter⁸⁸ establishes the right to personal data protection, which goes far beyond the concept of communications within the context of Article 7 Charter, but also

⁸⁴ *Ibid.* para. 3.

⁸⁵ *Explanations to the Charter*, above n. 57.

⁸⁶ *Ibid.* 25.

⁸⁷ *C-94/00 Roquette Frères SA v. Directeur général* [2002] ECR I-9011, ECJ, Judgment of 22 October 2002.

⁸⁸ This is to a certain extent based on the provisions of the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

far beyond Article 8 ECHR, which certainly includes not only the right not to be interfered with, imposing a negative obligation on the part of the EU, but also the right to with the enactment of certain legislation, imposing a positive obligation on the EU. On the latter, Article 8(2) Charter requires that certain legislation be established to give effect to this right, in order to make the processing of personal data safe and legitimate, while guaranteeing the access of every person to his/her data and the right to have their data corrected. This is especially relevant with regard to the processing of personal data by police, other criminal-law-related bodies of the EU and Member States, as well as agencies who support victims.

Returning to the distinction between the two Charter provisions, one notes that Article 8 Charter guarantees the right to protection of personal data, be it secret or private personal data or public personal data, whereas Article 7 Charter only applies to private life (and data relevant to this private life). The connection between Articles 7 and 8 Charter was defined in *ANEF*, where the CJEU ruled that ‘the right to respect for private life with regard to the processing of personal data ... concerns any information relating to an identified or identifiable individual’.⁸⁹ We will have to look at more case law to understand this connection and to clarify whether all personal data falls within the privacy right (as the CJEU seems to suggest) or not. To ensure that data protection is a full positive obligation, the CJEU has ruled in *Commission v. Austria* that it is an obligation of the EU and its Member States to establish and ensure the functional independence of the body that oversees the application of legislation regarding data protection.⁹⁰ Such independence should be of a ‘complete’ nature.⁹¹ ‘Complete’ independence, in this regard, must include any kind of independence from the government political authorities, even exclusion of, e.g., the Chancellor’s right to oversight of the data protection supervisor’s director.⁹²

In *Belgische Vereniging van Auteurs*, the CJEU had to test whether the procedure for installing filtering systems of Internet service providers envisaged by national law to protect intellectual property holders was in compliance with the Charter provisions. The Court ruled that the contested filtering system might affect the rights of the hosting service provider *and* also the fundamental rights of that hosting service provider’s service users, namely, their right protected by the Charter to protection of their personal data and their freedom to receive or impart information.⁹³ The use of such filtering solutions required a fair balance between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

In *ANEF*, the CJEU ruled that, independent of the manner of processing of data in public sources:

⁸⁹ Joined Cases C-468/10 and C-469/10 *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF), Federación de Comercio Electrónico and Marketing Directo (FECMD) v. Administración del Estado*, ECJ, Judgment of 24 November 2011, para. 41.

⁹⁰ C-614/10 *Commission v. Austria*, ECJ, Judgment of 16 October 2012, para. 36.

⁹¹ *Ibid.* para. 38.

⁹² *Ibid.* paras 62–3.

⁹³ C-360/10 *Belgische Vereniging van Auteurs v. Netlog NV*, ECJ, Judgment of 16 February 2012, para. 48.

122 *Research handbook on EU criminal law*

the processing of data appearing in non-public sources necessarily implies that information relating to the data subject's private life will thereafter be known by the data controller and, as the case may be, by the third party or parties to whom the data are disclosed.

This decision sought a legitimate balance to ensure that the data were controlled while certain safeguards were provided to maintain the privacy of those data.⁹⁴

Digital Rights Ireland Ltd and Seitlinger and others related to the legality of the Data Retention Directive 2006/24/EC. The Court ruled that 'by adopting the Data Retention Directive, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality'.⁹⁵ The CJEU's emphasis on EU data sovereignty is a robust response to concerns regarding control over personal data stored on servers beyond the EU's borders and may generate certain problems to service providers in this market sector.⁹⁶ *Digital Rights Ireland Ltd* marks a huge step forward in assuring both private life and data protection, clearly standing as a benchmark for the upcoming legislative acts that may fall under this area. Lynskey notes that this is the first time that the CJEU has annulled an entire Directive on the basis of a Charter provision, indicating the Court's profound deference to fundamental rights.⁹⁷ Lynskey also argues that, while many Member States' courts have tried to expand their fundamental rights jurisdiction in this area of law, this CJEU judgment 'serves as a comforting safety-net in other States'.⁹⁸ All this seems quite significant for the development of fundamental rights in light of the growing criminal law of the EU.

10. EU CRIMINAL LAW, LEGALITY AND PROPORTIONALITY (ARTICLE 49 CHARTER)

We discussed above the small improvements compared to the ECHR brought about by the Charter. The creation of a separate right to data protection, discussed in the previous section, offers one example. Another is the well-grounded basis for the principle of legality and proportionality of criminal offences and penalties. Article 49 Charter provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

⁹⁴ *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF)*, above n. 89, para 45.

⁹⁵ CJEU, *Digital Rights Ireland*, Press Release No. 54/14 of 8 April 2014, referring to Joint Cases C-293/12 and C-594/12.

⁹⁶ Orla Lynskey, 'The Data Retention Directive is Incompatible with the Rights to Privacy and Data Protection and is Invalid in its Entirety: *Digital Rights Ireland*' (2014) 51 *CMLR* 1789, at 1790.

⁹⁷ *Ibid.* 1798.

⁹⁸ *Ibid.* 1811.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

The first and second paragraphs deal with the legality principle. According to the *Explanations* this provision merely imports the well-known principle of non-retroactivity in the context of criminal law sanctions, but uses a more flexible formulation in light of some of the Member States' laws and of Article 15 of the Covenant on Civil and Political Rights. The *Explanations* also note that this provision, in view of Article 52(3) Charter, has the same extent as the ECHR. In terms of the third paragraph, the *Explanations* note that this is a reflection of the common Member States tradition of the proportionality between the penalties and criminal offences.⁹⁹ I think this might be an understatement, since the principle laid down in Article 49(3) Charter seems to demand a broad application to criminal sanctions without any limitation. This needs to be appreciated for its scope compared to the national law standards and the standards used in the ECHR. The ECtHR only applies a proportionality test to sanctions when these interfere with existing rights, for instance, when journalists are prosecuted before the courts and freedom of expression comes into play.¹⁰⁰ General proportionality testing of (all) sanctions as such is not done and is not recognized as a right. With the new Article 49(3) Charter, one does not have to be a journalist to challenge the proportionality of penalties. A general right to proportionate sanctions is now recognized in a straightforward manner.

11. CONCLUSION

This chapter has addressed the topic of the interaction between EU fundamental rights law and EU criminal law. We have illustrated the plurality of sources and of actors that interplay within the EU system for the protection of fundamental rights, which bears the risk of complexity and uncertainty, but also has the potential to be a very protective system. Indeed, at least on paper, the norms that should coordinate this plurality of sources and of actors seem to aim for a maximum standard solution, incorporating also the fundamental rights protection of other fields. The chapter has also looked at several relevant provisions of the EU Charter of Fundamental Rights. Both these provisions

⁹⁹ *Explanations to the Charter*, above n. 57, at 68.

¹⁰⁰ In *Weber v. Switzerland*, the Court found that Art. 10 on freedom of expression applied and ruled that due to the choice of the sanction in question, imposing a 'fine on a journalist who breached the confidentiality of a preliminary investigation was not consistent with the principle of proportionality'. See Els Dumortier, Serge Gutwirth, Sonja Snacken and Paul De Hert, 'The Rise of the Penal State: What Can Human Rights Do About It?' in S. Snacken and E. Dumortier (eds), *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy* (London, Routledge, 2012), pp. 107–32, at 119. Note that the ECtHR does not restrict its role to analyzing the nature of the penalties imposed, but also assesses their severity when measuring the proportionality of the interference, provided that these interferences can be connected with existing Convention rights.

124 *Research handbook on EU criminal law*

and the relevant case law show an encouraging picture of extensive protection in a very sensitive field such as the penal one. Yet, when it comes to practical application of fundamental rights provisions, on occasions where they might clash with national and EU criminal provisions, the CJEU has so far demonstrated a certain unbalanced attitude, giving precedence to the effectiveness of EU criminal law over the fundamental rights standard. Fortunately, some of the recent legislative initiatives undertaken by the EU legislator for the approval of EU legislative instruments specifically targeted at safeguarding procedural rights in criminal proceedings, hint at an improved direction of a more refined interaction between fundamental rights and EU criminal law, where both the effectiveness of judicial cooperation instruments, as for instance the European Arrest Warrant, and high fundamental rights standards are ensured.